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The Constitutionality of Mandates to Purchase Health Insurance

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O'Neill Institute
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Legal Solutions in Health Reform

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O'Neill Institute

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THE LINDA D. AND TIMOTHY J. O'NEILL INSTITUTE FOR NATIONAL AND GLOBAL HEALTH LAW AT GEORGETOWN LAW

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OVERVIEW
LEGAL SOLUTIONS IN HEALTH REFORM

The American public has increasingly identified health care as a key issue of concern. In order to address the multiple problems relating to the access and affordability of health care, President Obama and federal lawmakers across the political spectrum continue to call for major health reform. In any debate on health reform, a predictable set of complex policy, management, economic, and legal issues is likely to be raised. Due to the diverse interests involved, these issues could lead to a series of high-stakes policy debates. Therefore, **it is critical that advocates of reform strategies anticipate such issues in order to decrease the likelihood that legally resolvable questions become barriers to substantive health reform**. In an effort to frame and study legal challenges and solutions in advance of the heat of political debate, the O'Neill Institute for National and Global Health Law at Georgetown University and the Robert Wood Johnson Foundation have crafted the "Legal Solutions in Health Reform" project.

This project aims to identify practical, workable solutions to the kinds of *legal issues* that may arise in any upcoming federal health reform debate. While other academic and research organizations are exploring important policy, management, and economic questions relating to health reform, the O'Neill Institute has focused solely on the critical legal issues relating to federal health reform. The target audience includes elected officials and their staff, attorneys who work in key executive and legislative branch agencies, private industry lawyers, academic institutions, and other key players. This project attempts to pave the road towards improved health care for the nation by providing stakeholders a concise analysis of the complex legal issues relating to health reform, and a clear articulation of the range of solutions available.

LEGAL ISSUES V. POLICY ISSUES

Among the major issues in federal health reform, there are recurring questions that are policy-based and those that are legally-based. Many times questions of policy and of law overlap and cannot be considered in isolation. However, for the purpose of this project, we draw the distinction between law and policy based on the presence of clear legal permission or prohibition.

Under this distinction, policy issues include larger-scale questions such as what basic model of health reform to use, as well as more technical questions such as what threshold to use for poverty level subsidies and cost-sharing for preventive services. In contrast, legal issues are those involving constitutional, statutory, or regulatory questions such as whether the Constitution allows a certain congressional action or whether particular laws run parallel or conflict.

Based on this dividing line of clear permission or prohibition, policy questions can be framed as those beginning with, "*Should we…?"*, and legal questions can be framed as those beginning with, "*Can we…?"* The focus of this paper will be the latter, broken into three particular categories: 1) "Under the Constitution, *can we ever…?*"; 2) "Under current statutes and regulations, *can we now…?";* 3) " Under the current regulatory scheme, *how do we…?"* This final set of questions tends to be mixed questions of policy, law, and good legislative drafting.

PURPOSE AND LAYOUT OF THE PROJECT

This project is an effort to frame and study legal challenges and solutions in advance of the heat of political debate. This effort is undertaken with the optimistic view that all legal problems addressed are either soluble or avoidable. Rather than setting up roadblocks, this project is a constructive activity, attempting to pave the road towards improved health care for the nation. Consequently, it does not attempt to create consensus solutions for the identified problems nor is it an attempt to provide a unified field theory of how to provide health insurance in America. Furthermore, this project does not attempt to choose among the currently competing proposals or make recommendations among them. Instead, it is a comprehensive project written to provide policy makers, attorneys, and other key stakeholders with a concise analysis of the complex legal issues relating to health reform and a clear articulation of the range of solutions available for resolving those questions.

LEGAL ISSUES

Based on surveys of current health policy meetings and agendas, popular and professional press, and current health reform proposals, our team formulated a list of legal issues relating to federal health reform. After much research, discussion, and expert advice and review, our initial list of over 50 legal issues was narrowed to ten. An initial framing paper was drafted which identified these ten legal issues and briefly outlined the main components of each. In May of 2008, a bipartisan consultation session was convened to provide concrete feedback on the choice and framing of the legal issues. The attendees of the consultation session included congressional staff, executive branch officials, advocates, attorneys, employers, and representatives of a wide range of interests affected by health reform. Feedback and analysis from this session further narrowed the ten issues to eight key legal issues which warranted in depth analysis of the current law.

These eight pertinent issues are truly legal in nature and must be addressed in any significant reform proposal to avoid needless debate or pitfalls as policy decisions are made. There are multiple other legal issues that will arise as the discussion evolves and, if a federal policy is adopted, the system changes. In this project, however, we have targeted the issues essential for an immediate discussion of federal health reform.

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LEGAL SOLUTIONS IN HEALTH REFORM PROJECT

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EXECUTIVE SUMMARY
Prepared by the O'Neill Institute

INTRODUCTION:

Health insurance mandates have been a component of many recent health care reform proposals. Because a federal requirement that individuals transfer money to a private party is unprecedented, a number of legal issues must be examined. This paper analyzes whether Congress can legislate a health insurance mandate and the potential legal challenges that might arise, given such a mandate. The analysis of legal challenges to health insurance mandates applies to federal individual mandates, but can also apply to a federal mandate requiring employers to purchase health insurance for their employees. There are no Constitutional barriers for Congress to legislate a health insurance mandate as long as the mandate is properly designed and executed, as discussed below. This paper also considers the likelihood of any change in the current judicial approach to these legal questions.

POTENTIAL SOLUTIONS:

- **Congress's Authority to Regulate Commerce:** The federal government has the authority to legislate a health insurance mandate under the Commerce Clause of the United States Constitution. A federal mandate to purchase health insurance is well within the breadth of Congress' power to regulate interstate commerce. Congress can avoid legal challenges related to the 10th Amendment and states' rights by pre-empting state insurance laws and implementing the mandate on a federal level. If Congress wants states to implement a federal mandate, it has the following two options:
  - **Conditional Spending:** Congress may condition federal funding, such as that for Medicaid or public health, on state compliance with federal initiatives.
  - **Conditional Preemption:** Congress may allow states to opt out of complying with direct federal regulation as long as states implement a similar regulation that meets federal requirements.
- **Congress's Authority to Tax and Spend for the General Welfare:** Congress also has the authority to legislate a health insurance mandate under its Constitutional authority to tax and spend. There are no plausible Tenth Amendment and states' rights issues arising from Congress's taxing and spending power. However, Congress' taxation power cannot be used in a way that burdens a fundamental right recognized in the Constitution's Bill of Rights and judicial interpretations by the U.S. Supreme Court. Since there is no fundamental right to be uninsured, no fundamental rights challenge exists.
- **Other Relevant Constitutional Rights:** Challenges under the First and Fifth Amendments relating to individual rights may arise, but are unlikely to succeed. The federal government should include an exemption on religious grounds to a health insurance mandate as an added measure of protection from legal challenges based on religious freedom. In the alternative, the federal government can simply exempt a federal insurance mandate from existing federal legislation protecting religious freedom.
- **Considerations:** To avoid a heightened level of scrutiny in any judicial review, the federal government should articulate its substantive rationale for mandating health insurance during the legislative process.

LEGAL ISSUES & APPLICABLE LAW:

- **Commerce Clause:** Congress has the power to regulate interstate commerce, including local matters that substantially affect interstate commerce. Health care and health insurance both affects and is distributed through interstate commerce, giving Congress the power to legislate an insurance mandate using its Commerce Clause powers.
- **Taxing and Spending Power:** Congress has the power to tax and spend for the general welfare. It can use its taxing power to implement a "pay or play" model to tax individuals that did not purchase insurance or provide tax benefits to those that do purchase insurance. Congress can also use its spending powers to influence state action. The taxing power of the federal government can be limited if a tax intentionally and directly burdens the exercise of a fundamental right.
- **Federalism:** The 10th Amendment and principle of state sovereignty in the Constitution prohibit the federal government from commanding the states to implement federal law or policies that would interfere with state sovereignty. This is referred to as the "anti-commandeering" principle. A federal employer mandate covering state and local government workers appears consistent with existing Constitutional decisions but still might be susceptible to challenge under the Tenth Amendment.
- **Individual Rights:** The First and Fifth Amendment contain provisions that may have some bearing on a health insurance mandate.
    - **Free Exercise of Religion:** The First Amendment's Free Exercise Clause protects the free exercise of religion. In addition, the Religious Freedom Restoration Act (RFRA) prevents the federal government from enacting a law that substantially burdens an individual's exercise of religion, unless the government has a compelling interest.
    - **Due Process and Takings Clauses:** The Fifth Amendment includes two relevant provisions. The Due Process Clause guarantees that no person shall be deprived of life, liberty, or property without due process of law. The Takings Clause states that the government may not take an individual's property without just compensation.

CONCLUSION:

The Constitution permits Congress to legislate a health insurance mandate. Congress can use its Commerce Clause powers or its taxing and spending powers to create such a mandate. Congress can impose a tax on those that do not purchase insurance, or provide tax benefits to those that do purchase insurance. If Congress would like the states to implement an insurance mandate, it can avoid conflicts with the anti-commandeering principle by either preempting state insurance laws or by conditioning federal funds on state compliance. A federal employer mandate for state and local government workers may be subject to a challenge; however, such a challenge is unlikely to be successful. Individual rights challenges under the First Amendment's Free Exercise Clause or RFRA are unlikely to succeed, although a federal insurance mandate should include a statement that RFRA does not apply or provide for a religious exemption. Fifth Amendment Due Process and Takings Clause challenges are also unlikely to be successful. The legal analysis presented is likely to endure, as the Supreme Court's current position and approach to interpreting relevant constitutional issues appear to be stable.

Legal Solutions in Health Reform:
The Constitutionality of Mandates to Purchase Health Insurance

Mark A. Hall[1]

Introduction

A. Background

Many proposals to reform health care finance and delivery require individuals or private employers to pay for private health insurance. Senators Ron Wyden and Robert Bennett's Healthy Americans Act, for instance, would require every adult person who is not covered by a public program to purchase health insurance. Similarly, President Obama's campaign proposal requires that parents arrange for coverage of their minor children and that all but small employers pay a tax if they do not provide their workers health insurance.

This paper addresses the constitutionality of such proposals. Compulsory health insurance might raise constitutional concerns because there is no existing social legislation that serves as a perfect legal analogy to an individual mandate for private health insurance. Insurance mandates are familiar in other contexts, such as automobile liability, but they present an easier case for constitutionality[2] because they are a condition of exercising a privilege, such as driving a car. The requirement that workers contribute to Medicare and Social Security retirement is closer, but this requirement is imposed as a tax rather than a purchase mandate. Other mandates such as immunizations or attending school have well-established validity, but they rely on sufficiently different justifications that are not particularly strong as precedents.

A direct and unconditional federal requirement for an individual to transfer money to a private party for health or economic purposes seems to be unprecedented. There are abundant examples of *prohibiting* such a transfer, say for the purchase of illegal drugs or gambling or money laundering, but no examples of requiring a purchase other than as a regulatory condition (*e.g.*, building code requirements under environmental laws and the Americans with Disabilities Act).

Possible approaches to compulsory health insurance differ in many specifics – from the populations covered to subsidies and waivers to the means of enforcement. This paper focuses on mandating individuals to purchase private insurance, but it also applies to employer mandates. The paper assumes that people with low income or few assets would receive some type of government subsidy, but that the subsidy might not be generous enough to avoid any potential for financial hardship. We also assume that such mandates are enforced through financial penalties, such as tax assessments or, at most, civil fines, but not through criminal law that would result in imprisonment (or probation), absent some other criminal act (such as tax fraud or evasion).

B. Summary of Analysis

An individual (or employer) mandate to purchase private health insurance raises several possible constitutional issues. This paper focuses mainly on U.S. Constitutional law applied to a federal mandate, but the second half (part II) also applies to state mandates and might be relevant under state constitutions (depending on their particular wording and jurisprudence).

We first explore whether compulsory health insurance falls within any recognized federal legislative powers. Although the Constitution does not confer plenary powers over public welfare like those possessed by the states, a mandate to purchase health insurance appears to fall fairly readily within the current breadth of Congress's power to regulate interstate commerce. Also, if the sole means used to enforce compulsory insurance is the federal tax system, then this requirement would easily fall within Congress's broad powers over taxation. Moreover, under Congress's broad power to spend to promote the general welfare, it could require states to adopt an insurance mandate as a condition for receiving health-related federal funding. There are no plausible federalism objections to any of this as long as state and local governments are not required to purchase insurance for their own employees, but even that requirement appears to be consistent with current Supreme Court precedents.

This paper next examines whether either a federal or state mandate would violate individual liberties. There is no support in Supreme Court decisions for a *constitutional* objection based on religious liberty, but a *statutory* objection might be made under the Religious Freedom Restoration Act (RFRA), unless Congress provided a conscientious objector opt-out or unless it expressly overrode RFRA's application to compulsory health insurance.

Under the Due Process Clause, no Supreme Court decision since 1935 has struck down any state or federal legislation for infringing economic liberties, and any such action would be radically inconsistent with current constitutional doctrine. A plausible challenge might be made, however, under the Takings Clause (which prohibits taking private property for "public use" without paying "just compensation"), but such a challenge is not likely to succeed. There is no solid precedent that applies the Takings Clause to mandated purchases of any kind. To succeed, one would need to convince the Court that the Takings Clause applies to fungible money and that mandating a private purchase constitutes a government taking. These positions are inconsistent with some previous Court decisions. Moreover, a Takings Clause challenge could easily be avoided by framing the mandate as a taxation provision (*i.e.*, simply a tax benefit for complying or a tax levy for not complying).

Finally, the paper explains why the major contours of this constitutional jurisprudence appear to be secure, and not likely to shift substantially based on the current or future composition of the Court. Accordingly, the paper concludes that either state or federal mandates for either individuals or employers to purchase health insurance will pass scrutiny under the U.S. Constitution. Still, challenges to some versions of compulsory health insurance would be possible. Therefore, the safest versions – those least susceptible to challenge – would be mandates that: 1) contain explicit findings about effects on and in interstate commerce; or 2) are conditioned on federal spending or federal taxation; and 3) avoid state and local government employers; and 4) provide a religious exemption or exception from RFRA.

I. Federal Power to Legislate an Insurance Mandate

The first question is whether a mandate to purchase health insurance is within the constitutional powers of the federal government. The federal government, of course, has limited powers. It can legislate only under one of the authorizations enumerated in the Constitution. Notably absent is any general police power or any reference to public health and safety, powers that

traditionally are exercised by the states. Two federal possibilities exist: 1) the Commerce Clause, and 2) the power to tax for the general welfare. Also, these powers might be limited by the federalism or "states' rights" concerns expressed in the 10th Amendment.

A. The Commerce Clause

1. Current Law

Under the Commerce Clause, "Congress shall have power . . . to regulate commerce . . . among the several states . . . ."[3] Originally, the Court interpreted interstate commerce to mean only the movement of goods or services across state lines, or transactions between people in different states. Since 1937, however, it has been firmly settled, and the Court has said repeatedly that the Commerce Clause also includes local matters that substantially affect interstate commerce.[4]

This expansive stance was affirmed most recently and prominently in *Gonzales v. Raich*[5], which held that the Commerce Clause confers power to prohibit the use of marijuana for medical purposes, even when it is grown at home and consumed personally. Citing earlier precedents, the Court used the deferential "rational basis" test to conclude that this "regulation is squarely within Congress' commerce power because production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity."[6]

The Supreme Court in *United States v. Lopez*,[7] emphasized, however, that even under our modern, expansive interpretation of the Commerce Clause, Congress' regulatory authority is not without enforceable bounds. *Lopez* is one of two 5-4 decisions authored by Justice Rehnquist that set subject matter limits on federal power for the first time in 60 years, explaining:

> In *Jones & Laughlin Steel*, the Court warned that the scope of the interstate commerce power "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.[8]

Each of these limiting cases, though, is restricted to criminal laws that address non-economic activity. In *Lopez* the Court struck down a federal law mandating a gun-free zone around public school campuses because it was "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms. . . . . It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce."[9] In *United States v. Morrison*,[10] the Court invalidated the portion of the Violence Against Women Act that created civil liability for gender-based violent crimes. The Court explained that both in *Morrison* and in *Lopez*, "the noneconomic, criminal nature of the conduct at issue was central to our decision."[11]

2. Application to Compulsory Health Insurance

It is manifest that health insurance deals with economic transactions and substantially affects interstate commerce. Although much of health care delivery is local, most medical supplies, drugs and equipment are shipped in interstate commerce. Accordingly, the antitrust laws, for instance, have been applied repeatedly to local hospital and physician activities. In *Hospital Bldg. Co. v. Rex Hospital Trustees*,[12] the Court held that allegations of the "combination of factors" just noted "is certainly sufficient to establish a 'substantial effect' on interstate commerce" under the Sherman Antitrust Act.

Even more directly relevant is that most health insurance is sold through interstate companies. All of the largest insurers in the country operate on a multi-state basis. Although in many states the largest insurer is a locally owned and operated Blue Cross/Blue Shield plan, these Blues plans contract with each other to accept Blues subscribers from any state into their provider networks.

Regardless of how insurance is sold, it is well-established that matters relating to insurance substantially affect interstate commerce.[13] In 1945, the Court (overruling its earlier precedent) ruled that insurance was interstate commerce subject to federal regulation.[14] In response, Congress enacted the McCarran-Ferguson Act[15] to declare that federal regulation of insurance is not to be inferred or assumed unless federal laws do so explicitly.

Mandating health insurance directly affects interstate commerce in several ways. Covering more people is expected to reduce the price of insurance by addressing free-rider and adverse selection problems. Free riding includes relying on emergency care and other services without paying for all the costs, and forcing providers to shift those costs onto people with insurance. Adverse selection is the tendency to wait to purchase until a person expects to need health care, thereby keeping out of the insurance pool a full cross section of both low and higher cost subscribers. Covering more people also could reduce premiums by enhancing economies of scale in pooling of risk and managing medical costs.

Thus, absent any special states' rights concerns under the 10th Amendment (discussed below), it is clear and well-settled that Congress has the power to mandate the purchase of health insurance. To be extra safe, in view of Rehnquist-Court decisions (such as *Lopez* and *Morrison*) Congress should make an explicit jurisdictional statement with express findings on the substantial effects that an insurance mandate is expected have on or in interstate commerce.

B. General Welfare

Rather than a direct mandate enforced by civil fines, Congress might instead impose a tax on people who do not have health insurance, as Massachusetts has done, or provide a tax credit or other benefit for those who do have health insurance. Structured this way, the "mandate" would not be a direct regulation; instead, it would impose indirect regulatory effects from a specially crafted tax law. This alternative to a mandate is frequently distinguished as a "play or pay" option: either employers or individuals play by purchasing insurance, or they pay a tax. Another

approach might be to require states to adopt their own versions of compulsory health insurance, as a condition for receiving federal funding.

These two approaches implicate Congress's power under the Constitution "to lay and collect taxes . . . and provide for the . . . general welfare of the United States."[16] The Court has held numerous times that this part of the Constitution confers not only the power to tax, but also the power to spend in order to enhance the general welfare of the population.

1. Taxation Power

One of the seminal decisions that ushered in the modern era of constitutional law upheld mandatory contributions to the Social Security Act system based on Congress's power to tax for the general welfare.[17] A "play or pay" approach that uses tax laws to require private health insurance differs somewhat from Social Security contributions, but this approach still is well-supported by federal constitutional precedents.

It is often said that the power to tax is "plenary," meaning that, in general, Congress or the States can tax or exempt whatever or whomever or however much they want, subject to only diminishingly few limitations.[18] There was a time when the Court invalidated tax laws that had primarily a regulatory rather than a revenue-generating purpose. For instance, it struck down a federal tax on products shipped in interstate commerce that were manufactured using child labor.[19] But, the Court long ago overturned or abandoned these precedents and concepts.[20] In 1937, the Court explained that "Every tax is in some measure regulatory. . . .But [it] is not any less a tax because it has a regulatory effect. . . . Inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of the courts."[21] Thus, challenges to tax laws succeed only when taxes directly or intentionally burden the exercise of fundamental rights.[22] As noted below, there is no fundamental right to be uninsured.

2. Spending Power

Congress may also use its power to spend to encourage states to adopt desired laws. This approach, which allows greater flexibility among states and accounts for varying local or regional conditions, has been used before in federal health care legislation.[23] Following it, Congress could withhold health care funding for programs such as Medicaid or public health if states did not adopt insurance mandates.

According to constitutional scholars, the "Court still almost routinely upholds intrusions that would almost certainly be invalidated if imposed by direct regulation, when couched as conditions to eligibility for federal funds. . . . The Supreme Court has never held a conditional grant to state or local governments to be unconstitutional."[24] For instance, in *South Dakota v. Dole*,[25] the Court upheld a federal law that withheld highway funds to states that did not raise their legal drinking age to 21.

The only potential limits, recognized but never enforced in modern times, are that the financial penalties not constitute "compulsion," and that they be logically related to the required law.[26] Scholars puzzle over when penalties might be coercive, but they generally conclude that the

Court "seems a long way" from finding that this limit has been exceeded.[27] Nevertheless, it would be prudent, if Congress were to follow this legislative approach, to make explicit findings about the reasonableness of the funding penalty relative to the harms to federal interests caused by a state's failure to legislate.

C. Federalism Limits

1. Current Law

The Tenth Amendment reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[28] For many decades, this provision had no obvious independent force, since it was viewed merely as the "truism that all is retained which has not been surrendered."[29]

In the last two decades, though, the Court has set forth an important limit on federal power based on this text or on the general federalism principle of respecting states' sovereignty that is built into the Constitution's structure as a whole. In *New York v. United States*,[30] the Court struck down, on 10th Amendment grounds, a federal law that required states to take title to any radioactive waste within their borders that was not properly disposed of within 10 years, and that made states liable in damages for harms caused by such waste. The Court in *Printz v. United States*,[31] applied the *New York* case to find that the Brady Handgun Violence Prevention Act violated the 10th Amendment because it required state and local law enforcement officials to conduct background checks on people purchasing handguns. The key concern was that the Act "forced participation of the State's executive in the actual administration of a federal program . . . ."[32]

These decisions and the related federalism concerns have been interpreted as prohibiting only what has come to be called "commandeering," that is, commanding state officials to implement federal laws and policies or otherwise directly invading state sovereignty.[33] When Congress "does not require the States in their sovereign capacity to . . . enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals," the Court has ruled that there is no federalism constraint on Congressional power.[34] Thus, since the 1930s, the Court has never set 10th Amendment limits on Congress's exercise of its power to tax or power to spend. In modern times, the 10th Amendment to date has been used to limit only Congress's *regulatory* powers under the Commerce Clause.

2. Application to Compulsory Health Insurance

No commandeering element is needed in a federal mandate for private health insurance since this would not require state implementation. Instead, Congress could simply pre-empt state insurance laws, as it now does through ERISA. However, Congress might prefer state implementation for federalism reasons expressed in the McCarran-Ferguson Act, and to better reflect varying local conditions. If so, Congress would need to find some means to induce states to act.

There are two recognized approaches: conditional spending and conditional pre-emption.[35] Using the first approach, the previous section explains that Congress could condition the receipt

of relevant federal funds on states enacting complying legislation. Using the second approach, Congress could simply allow states with complying laws to opt out of pre-emption and direct federal regulation. The Court in *New York v. United States*[36] stated that, "where Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to Federal standards or having State law preempted by Federal regulation."[37]

For instance, Congress has used conditional pre-emption in HIPAA, which applies a federal "fall-back" or default law to states that do not enact laws providing for guaranteed issue and portability of group health insurance (among other requirements). Although the constitutionality of this part of HIPAA has not been challenged, it is widely regarded as a successful balance of federalism concerns.[38]

The remaining federalism concern is whether Congress could apply an employer mandate to state and local government employers. The answer appears to be uncertain. The Court in *Garcia v. San Antonio Metropolitan Transit Authority,*[39] overruled a prior decision to hold that state and local government employees are subject to federal minimum wage and overtime laws. However, the Court did not provide a helpful conceptual framework for a 10th Amendment analysis. Instead, it held in Delphic fashion that "we need go no further than to state that we perceive nothing in the overtime and minimum-wage requirements of the FLSA … that is destructive of state sovereignty …"[40]

Although it is impossible to know how extensive this precedent is, mandating employee benefits appears indistinguishable from mandating wage levels, and therefore is supported by *Garcia*. Still, considering the closeness and narrowness of this decision, the change in Court membership since then, and the emergence of new federalism limits in subsequent Court opinions, it is possible that a federal law mandating states or municipalities to fund health insurance for their employees could be challenged on 10th Amendment grounds.

II. Individual Rights

This part considers challenges to compulsory health insurance based on individual rights protected by the 1st and 5th Amendments. Because the 14th Amendment incorporates these and other Bill of Rights' amendments, the analysis in this part applies to both state and federal legislation.

A. First Amendment

One potential basis for an individual-rights challenge to compulsory health insurance is a religious objection under the 1st Amendment's Free Exercise Clause. Although an insurance mandate does not require anyone to use medical care, the Supreme Court has been willing to assume that some religions (*e.g.*, the Amish) have a conscientious objection even to having insurance.[41] Nevertheless, state laws are valid despite violating religious faith as long as they have general applicability and there is a rational basis for covering both religious and non-religious practices.[42]

Thus, both states and the federal government may constitutionally mandate health insurance. However, the legal environment for the federal government is clouded by the Religious Freedom Restoration Act of 1993 (RFRA),[43] Under RFRA, "the Federal Government may not, as a statutory matter, substantially burden a person's exercise of religion, 'even if the burden results from a rule of general applicability,'" unless there is a compelling reason and the least burdensome means is used.[44]

It is open to debate whether an insurance mandate would satisfy RFRA's strict scrutiny. Prior to RFRA, the Court in *U.S. v. Lee*,[45] found compelling justification to require Amish employees to contribute to Social Security, but this was based in large part on the concern that the "tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief."[46] Here, we are contemplating the mandatory purchase of private insurance, which differs significantly from a general tax in its need for uniformity.

Recently, the Court held that RFRA "requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person' – the particular claimant whose sincere exercise of religion is being substantially burdened."[47] A more general interest in uniform application and administrative efficiency suffices only if the government offers "evidence that granting the requested religious accommodations would seriously compromise its ability to administer the program."[48] This is a demanding standard. Therefore, to be safe, a federal mandate should either provide for some form of religious exemption (as the Healthy American's Act currently proposes), or declare that RFRA does not apply, or both. Congress, of course, is constitutionally free to enact exceptions or modifications to its own statutes.

B. Fifth Amendment

The 5th Amendment reads: "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."[49] We will separately address the Due Process and the Takings Clauses.

1. Substantive Due Process

Requiring someone to spend money they don't want to spend could be viewed as a deprivation of property or liberty, which the 5th Amendment allows only with "due process." In the "*Lochner* era" of constitutional jurisprudence (which began with the infamous *Dred Scott* decision), the Court regularly struck down economic and social regulation for lack of due process when it felt that sufficiently compelling reasons for the laws were lacking. For instance, the Court held that maximum hour, minimum wage, and child labor laws were all unconstitutional because they infringed economic liberties, despite justifications relating to health among others. This "substantive due process" approach has not been followed since 1937, however.

In modern times, substantive due process does not apply to general economic and social rights. Instead, it is limited to special areas of concern, such as procreation, marriage, bodily integrity, and other rights "deeply rooted in the history and traditions of the United States."[50] Absent restriction of such "fundamental rights," laws affecting general economic and social rights meet

due process requirements if they are minimally rational, which means the law is one conceivable way to advance a legitimate governmental goal. This standard is so lenient that "the Court has not invalidated an economic regulation on substantive due process grounds since 1937."[51]

There is no fundamental right to be uninsured. Even at worst, if complying with an insurance mandate was to leave someone destitute or bankrupt, substantive due process does not reach these situations.[52]

The Supreme Court has stated or assumed that the right to refuse medical treatment is a protected liberty interest.[53] Similarly, the right to seek medical care might conceivably be framed as a specially protected liberty interest.[54] This liberty interest, in turn, conceivably could form the basis for protecting a right to *purchase* health insurance in order to afford treatment.[55] However, the issue here is just the opposite: an imagined right to *decline* insurance, which implicates only economic interests. Because having insurance does not require anyone to use it, an insurance mandate should not implicate interests in either bodily integrity or decisional autonomy related to health care.

This leaves us with the very lenient rational basis test, which a health insurance mandate easily meets. It is not necessary for Congress to find that compulsory insurance is the only or the best or the least restrictive way to achieve its goals, only that one can reasonably imagine a scenario under which the law is not arbitrary and capricious.

A reasonably close precedent is *Williamson v. Lee Optical Co.*,[56] which upheld a state law requiring a prescription in order to replace existing lenses or refit them into new frames. Opticians who challenged the law argued that there was no need for a new prescription simply to replace frames or duplicate a broken lens. The Court disagreed, explaining that "the legislature may have concluded that eye examinations were so critical, not only for correction of vision but also for detection of latent ailments or diseases, that every change in frames and every duplication of a lens should be accompanied by a prescription from a medical expert."[57] Even if this imagined justification was half-baked or largely unsupported, the Court reasoned that it was good enough for due process purposes stating,

> [the] law may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement. . . . It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.[58]

2. Taking of Private Property

Could an insurance mandate also be regarded as a government "taking" of private property without "just compensation"? There are no modern or other precedents that apply the Takings Clause to this or analogous situations, and there is at least one modern precedent (discussed below) that rejects a similar application. Nevertheless, the issue is sufficiently clouded that it bears more detailed analysis.

a. Is Money "Property"?

First, is money "property" under the Takings Clause? Certainly money is property for most purposes, but there are surprisingly few takings cases that apply to money or its equivalents. Taxes take money every day for public uses, but they are not subject to the Takings Clause. Still, there are a few Supreme Court Takings cases that reach money, most notably, those that deal with interest earned on lawyers' trust accounts (IOLTA funds). Because of technicalities that prevent interest on trust accounts accruing either to lawyers or to their clients, most states require that these interest earnings be turned over to a non-profit foundation set up by the state Bar to fund indigent legal services. The Supreme Court held that these IOLTA funds constitute private property for purposes of the Takings Clause.[59] (However, a subsequent decision held that no compensation was owed because clients did not suffer an economic loss in losing funds they were not entitled to earn in the first place.[60])

Still, the Court has never squarely held that generic money qualifies as property for purposes of the Takings Clause. In *Eastern Enterprises v. Apfel*,[61] a fractured set of opinions appeared to restrict the IOLTA-type precedent to discrete, ear-marked accounts, rather than to the taking of money generally. *Apfel* addressed the federal Coal Industry Retiree Health Benefit Act, which required current or former coal companies to fund health insurance benefits for retired coal workers. No one opinion garnered a majority, but the plurality (the one with the most votes, authored by Justice O'Conner and joined by Justices Rehnquist, Scalia and Thomas) struck down this law as a taking (for reasons described below). However, the five other Justices disagreed (in two different opinions) that a takings characterization fit these facts. Instead, they applied a substantive due process analysis. Among this five, only Justice Kennedy found a due process violation. Although the Act was invalidated, there was no one controlling rationale, and paradoxically there were at least five votes against each of the separate rationales used to reach this result.

This splintering makes it difficult to interpret *Apfel*, but several scholars read it as five members of the Court rejecting the proposition that ordinary (fungible) money constitutes property for takings purposes.[62] Because the decision was not clear and it was only narrowly decided, it is probably not safe at this point to rest solely on this rationale.

b. Is Compulsory Purchase a "Taking"?

Even if money is property, is a mandate to purchase private insurance a government "taking" of the purchaser's money? Arguably not. Some constitutional scholars believe that the Takings Clause should be restricted to situations where the *government uses* the assets taken, not where it merely *regulates* their use by *private* parties.[63] This "government usings" position, however, has not been endorsed by the Supreme Court. Instead, it was rejected explicitly by Justice Kennedy in his lone opinion in *Apfel*, and implicitly by the plurality of four. Although Kennedy rejected the plurality's takings analysis (for the separate reason that money is not property), he briefly noted his disagreement with this argument.[64]

Even if requiring people to purchase their own private insurance might conceivably be regarded a "taking for public use," this certainly is not a classic, overt, or *per se* taking. Instead, the Court would regard this as a potential "regulatory taking." When the government regulates the use of

property, the Court applies a set of factors to determine whether the regulation is severe enough to constitute a taking. These factors include the magnitude of the economic impact, how it is distributed across other property owners, and the extent to which the regulation interferes with the owner's reasonable investment-backed expectations.[65]

Under these factors, Justice O'Connor's plurality opinion in *Apfel* found that an employer mandate to fund retiree health benefits was a regulatory taking. The Court felt that the law unfairly imposed an enormous obligation on a former coal company to pay for the future health benefits of long-ago retired workers, even after the company was no longer in the mining business.

Although the *Apfel* case nominally relates to health insurance, it bears little resemblance to requiring individuals to purchase health insurance for themselves or requiring employers to do so for current employees. Instead, it appears to be the quintessential situation of hard facts generating a decision that, if not "bad," at least is not expansive.

In any event, the other five Justices disagreed with the plurality's takings analysis, and the Court rejected a similar challenge in an earlier decision that dealt with pension plan liability.[66] Moreover, our situation differs significantly from *Apfel*. Compulsory insurance would apply to most people and so not impose hugely disproportionate burdens on a few. Under an individual mandate, people would receive something of value in return for their money, which dampens the economic impact. An employer mandate gives the employer nothing concrete in exchange, but unlike *Apfel*, which focused on health benefits for retirees of a company that had left the industry, an employer mandate presumably at least "buys" the employer some good will and morale among workers. In short, compulsory insurance is very far afield from any scenario in which the Court has come close to finding a "regulatory taking."

c. Summation

The analytic landscape of takings jurisprudence is complex and confusing, so it is difficult to see one's way clearly. The Takings Clause is the most plausible way to express the basic libertarian instinct that opposes the government forcing someone to spend their money on something they feel they don't want or need. Yet if the Takings Clause were to apply here, it would create innumerable problems and puzzles to ponder in all realms of social and economic regulation and taxation. Therefore, it is highly unlikely that a takings challenge would succeed, yet it is surprisingly difficult to reject it outright.

In the end, perhaps it is not necessary to find a single definitive rationale for rejecting a takings challenge. Some Justices may think that the Clause does not apply to money, others may think it does not apply to mandated purchases, and others that the burdens of purchasing health insurance do not rise to the level of a regulatory taking. In the end, there is no good precedent in favor of this application, and one close precedent (*Apfel*) opposed. As Justice Breyer summarized in *Apfel* (in dissent to the result, but agreeing with Justice Kennedy on the takings issue):

> The "private property" upon which the [Takings] Clause traditionally has focused is a specific interest in physical or intellectual property. It requires compensation when the government takes that property for a public purpose. This case involves

> not an interest in physical or intellectual property, but an ordinary liability to pay money, and not to the Government, but to third parties.[67]

But lest we forget, *Apfel* struck down an employer mandate for retiree health insurance. Even though no single rationale prevailed, a combination of takings and substantive due process doctrines resulted in a rare invalidation of economic legislation. Therefore, some scholars read *Apfel* as a possible revival of *Lochner*-type thinking.[68] Even if takings law is not the particular doctrinal route chosen, *Apfel* illustrates that *Lochner*-type results can emerge from a fragmented court via the convergence of multiple reinforcing rationales under the 5th Amendment – even when a majority of the court rejects each particular rationale. Still, *Apfel* is a unique case, one that is thought to apply mainly to situations of retroactive liability for past activity. Also, either a due process or a takings challenge can be avoided fairly readily by framing any purchase mandate as a tax penalty or benefit.

III. The Stability of Existing Precedents

So far this paper has addressed Constitutional law as it currently stands, but how stable is this law? According to prominent academic scholars, there is a notable intellectual movement, branches of which are known variously as the "Constitution in Exile" or the "Lost Constitution," that could dramatically reshape constitutional doctrine.[69]

These reformers would either restore some of the judicial approaches that prevailed prior to 1937 or give much more teeth to parts of the Constitution they believe are neglected (such as the 9th Amendment, the Contract Clause, or the Privileges or Immunities Clause). Through whichever route, the legal effect would be to strengthen substantially the constitutional protection of private property and economic liberties.[70] If some or all of these views were to prevail among a majority of the Court, the legal analysis outlined so far might change significantly, or even radically. This final section evaluates the likelihood of such a transformative shift in constitutional law.

The two Supreme Court cases most directly on point are *Helvering v. Davis*,[71] which upheld the constitutionality of the social security system as a legitimate use of Congress's general welfare power to tax and spend, and *Williamson v. Lee Optical*,[72] which rejected a due process challenge to a state law that required a prescription in order to replace eyeglass frames or duplicate existing lens. Both cases are still firmly considered to be good law, and have been cited approvingly in modern times by Justices Scalia, Kennedy, and Thomas, among others. More generally, the Roberts Court so far has not reversed a single Constitutional precedent nor has it struck down any laws for exceeding congressional powers. Therefore, a dramatic change in course does not appear likely.

Justice Alito and Chief Justice Roberts are too new to the Court to reliably assess their views about these transformative ideas. However, the positions of Justices Kennedy, Scalia and Thomas are well established. Only Justice Thomas appears willing to accept many of the transformist positions about federal powers. Justice Kennedy's positions are much more centrist on the extent of federal powers, and his judicial approach is more cautious about overturning established precedents.[73] The views of Justice Scalia, who sometimes is more outspoken, merit more attention.

There is good evidence that Justice Scalia is not likely to join or lead the transformist movement. He is firmly on record as opposing both the expansion of substantive due process and the radical retraction of interstate commerce jurisdiction. The scope of interstate commerce was the central issue in *Gonzales v. Raich*,[74] which permitted the government to outlaw "medical marijuana" in California. Concurring, Justice Scalia interpreted Congressional power to reach even farther than recognized by the majority. He said that

> the authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws governing intrastate activities that substantially affect interstate commerce. Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce.[75]

Also, he approvingly cited and quoted from leading historical precedents that expanded interstate commerce jurisdiction (*Darby* and *Jones & Laughlin Steel Corp.*), and he gave restrictive readings to the more recent limiting precedents in *Lopez* and *Morrison*.[76]

As to substantive due process, just prior to joining the Court, then-Judge Scalia had this to say:

> The Supreme Court decisions rejecting substantive due process in the economic field are clear, unequivocal and current, and as an appellate judge I try to do what I'm told. But I will go beyond that disclaimer and say that in my view the position the Supreme Court has arrived at is good or at least that the suggestion that it change its position is even worse.[77]

Since then, he (joined by Justice Thomas) has termed substantive due process an "oxymoron" rather than a "constitutional right" and declared his belief "that the Due Process Clause guarantees no substantive rights, but only (as it says) process."[78]

Some reputable scholars have articulated coherent constitutional theories that might prohibit government from mandating health insurance,[79] but these theories are inconsistent with prevailing constitutional jurisprudence, including that of Justices Scalia and Kennedy. Justice Scalia, in particular, is an intellectual leader among the judicial wing most concerned about expansion of federal powers. If he is not willing to embrace dramatic restrictions in federal powers or expansions in economic liberties, it is unlikely that these views will gain a majority footing in the Court any time soon. Therefore, the major outlines of constitutional law described in this paper appear to be stable.

IV. Summary of Legislative Options

Based on this extensive analysis of Supreme Court decisions and jurisprudence under the U.S. Constitution:

- Either state or federal government may require either individuals or employers to pay for health insurance. States have inherent power to promote health and provide for the

general welfare. The federal government has authority under its power to regulate interstate commerce.

- Government may also use a "play or pay" approach that imposes tax penalties on employers or individuals for failing to purchase insurance. A play or pay option is a bit safer because it would avoid any realistic possibility of attacking compulsory insurance as a denial of due process or an unjustified taking of property. However, such challenges to an outright mandate would be contrary to existing law and therefore not likely to succeed in any event.

If the federal government prefers to give states flexibility to use different approaches to accomplish an insurance mandate, it may do this either through:

- Conditional spending, that is, requiring states to adopt an insurance mandate in order to receive federal funding for health-related programs such as Medicaid, or

- Conditional pre-emption, that is, imposing a federal requirement as a default provision that states can opt out of by adopting a different approach that complies with the same objective.

Whichever approach a government chooses, it should articulate its substantive rationales in order to avoid any possibility of heightened scrutiny that calls the social, economic, or legal justification into question.

These major points of constitutional law appear to be firmly established and are not likely to change based on the near-term composition of the Court. However, there are two smaller areas of potential constitutional concern:

- If the federal government were to impose an *employer* mandate that covered state and local *government workers*, this might be subject to a challenge under the 10th Amendment, which protects states' sovereign prerogatives. Although current law appears squarely against such a challenge, this is an area where the Court might modify current precedents.

An individual mandate by the federal government could be challenged by those with religious objections. Although the Constitution provides no basis for such a challenge, the Religious Freedom Restoration Act (RFRA) might. Therefore, a federal mandate should either contain an exception for conscientious religious objection or should expressly override RFRA.

[1] Fred D. and Elizabeth L. Turnage Professor of Law, Wake Forest University.
[2] The U.S. Supreme Court upheld compulsory automobile insurance long ago, even when judicial scrutiny of economic and social legislation was much more demanding. *Ex Parte Poresky*, 290 U.S. 30 (1933).
[3] U.S. Const. Art. I, Sec. 8, Clause 3.
[4] See, e.g., *United States v. Darby Lumber Co*., 312 U.S. 100 (1941), overturning *Hammer v. Dagenhart*, 247 U.S. 251 (1918) regarding child labor laws.
[5] 545 U.S. 1 (2005) (6-3, per Stevens, J.).
[6] *Id*. at 19.
[7] 514 U.S. 549 (1995) (5-4, per Rhenquist, W.).
[8] *Id*. at 557.
[9] *Id*. at 561.
[10] 529 U.S. 598 (2000) (5-4, per Rhenquist, W.).
[11] *Id*. at 610.
[12] 425 U.S. 738 (1976) (9-0, per Marshall, J.).
[13] See A.B. Monahan, "Federalism, Federal Regulation, Or Free Market? An Examination of Mandated Health Benefit Reform," *University of Illinois Law Review*, (2007): 1361-1416, at 1389.
[14] *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944).
[15] 15 U.S.C. 1011 (2000).
[16] U.S. Const. Art. I Sec. 8 Clause 1.
[17] *Helvering v. Davis*, 301 U.S. 619 (1937).
[18] See E. Penalver, "Regulatory Taxings," *Columbia Law Review*, 104 (2005): 2198-99, at 2182.; L.P. Martinez, "The Trouble with Taxes: Fairness, Tax Policy, and the Constitution," *Hastings Constitutional Law Quarterly*, 31 (2004): 430-446, at 413 ("This deference to Congress or to state legislatures in matters relating to taxation is a theme that echoes throughout the Court's tax cases. . . . The power to tax is circumscribed only when a very high threshold of arbitrariness or irrationality is met.").
[19] *Baily v. Drexel Furniture Co*., 259 US 20 (1922).
[20] E. Chemerinsky, *Constitutional Law: Principles and Policies* (New York: Aspen Law & Business, 3rd ed. 2006) at 276-78.
[21] *Sonzinsky v. U.S*., 300 U.S. 506, 513 (1937). The modern view is captured in *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 547 (1983) (9-0, per Rehnquist, J.):

> Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes. . . . "The passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. . . . It has, because of this, been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes.

[22] T. A. Kaye and S.W. Mazza, "Constitutional Limitations on the Legislative Power to Tax in the United States," *Michigan State Journal of International Law*, 15 (2007): 481-520. There might also be a challenge if a tax law was not uniform across the states, but even then some variation is permitted to account for different local circumstances. See H.T. Greely, "Policy Issues in Health Alliances: Of Efficiency, Monopsony, and Equity," *Health Matrix*, 5 (1995): 37-82, at 65.
[23] For instance, before it was repealed the National Health Planning and Resources Development Act of 1974 required states, as a condition for receiving federal funds for hospital construction and medical institutions, to adopt a comprehensive "certificate of need" regulation of capital expenditures by health care facilities. Despite the federalism concerns of mandating state legislation that, in part, regulated state-owned facilities, the Supreme Court summarily affirmed a lower court's decision that this was a valid exercise of Congress's spending power. *North Carolina v. Morrow*, 435 U.S. 962 (1978), *affirming mem. North Carolina v. Califano*, 445 F. Supp. 532 (E.D.N.C., 1977) (3-judge court).
[24] A. J. Rosenthal, "Conditional Federal Spending and the Constitution," *Stanford Law Review*, 39 (1987): 1103-1164, at 1163.
[25] 483 U.S. 203 (1987) (7-2, per Rehnquist, J.),
[26] J. E. Nowak and R. D. Rotunda, *Constitutional Law* (St. Paul: West, 7th ed. 2004): 230-31.

[27] C. Hoke, "Constitutional Impediments to National Health Reform: Tenth Amendment and Spending Clause Hurdles," *Hastings Constitutional Law Quarterly*, 21 (1994): 489-575, at 572 (1994). Accord R. Briffault, "Federalism and Health Care Reform: Is Half a Loaf Really Worse Than None?" *Hastings Constitutional Law Quarterly*, 21 (1994): 611-633, at 613-16. See generally, K. M. Sullivan, "Unconstitutional Conditions," *Harvard Law Review*, 102 (1989): 1413-1506; L.A. Baker, "Conditional Federal Spending After Lopez," *Columbia Law Review*, 95 (1995): 1911-1989.
[28] U.S. Const. Amend. X.
[29] *United States v. Darby*, 312 U.S. 100, 124 (1941).
[30] 505 U.S. 144 (1992) (6-3, per O'Connor, J.).
[31] 521 U.S. 898 (1997) (5-4, per Scalia, J.).
[32] *Id*. at 918.
[33] See N. S. Siegel, "Commandeering and Its Alternatives: A Federalism Perspective," *Vanderbilt Law Review*, 59 (2006): 1629-1691; V. C. Jackson, "Federalism and the Uses and Limits of Law: *Printz* and Principle?" *Harvard Law Review*, 111 (1998): 2180-2259.
[34] *Reno v. Condon*, 528 U.S. 141, 151 (2000) (9-0, per Rehnquist, J.) (upholding a federal law prohibiting states from selling drivers license information for commercial purposes).
[35] Hoke, *supra* note 27 at 565.
[36] 505 U.S. 144 (1992) (6-3, per O'Connor, J.).
[37] *Id*. at 167.
[38] See, e.g., A. Kondrates et al., "Assessing the New Federalism: An Introduction," *Health Affairs* 17, no. 3 (1998): 17-24.
[39] 469 U.S. 528 (1985) (5-4, per Blackmun, J.)
[40] *Id*. at 554.
[41] *U.S. v. Lee*, 455 U.S. 252, 257 (1982).
[42] *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990).
[43] 42 U.S.C. § 2000bb et seq. Note, as the result of *City of Boerne v. Flores*, 521 U.S. 507 (1997), which held that RFRA's application to *state* laws unconstitutional, RFRA now applies only to federal laws.
[44] *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006) (quoting 42 U.S.C. § 2000bb-1(a)).
[45] 455 U.S. 252(1982).
[46] *Id*. at 260.
[47] *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006).
[48] *Id*. at 421.
[49] U.S. Const. Amend. V.
[50] *Washington v. Glucksberg*, 521 U.S. 702, 727 (1997).
[51] G. R. Stone, et al., *Constitutional Law* (New York: Aspen Publishers, 5th ed. 2005): at 765.
[52] See *U.S. v. Kras*, 409 U.S. 434, 445 (1973) ("We see no fundamental interest that is gained or lost depending on the availability of a discharge in bankruptcy.").
[53] E.g., *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990).
[54] Cf. *Alliance for Better Access to Developmental Drugs and Washington Legal Foundation v. Eschenbach*, 495 F.3d 695 (D.C. Cir. 2007).
[55] Cf. *Chaoulli v. Quebec*, 2005 SCC 35 (Canada) (finding such a right under Quebec's Charter of Human Rights).
[56] 348 U.S. 483 (1955).
[57] *Id*. at 487.
[58] *Id*. at 487-88.
[59] *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998) (5-4, per Rehnquist, J.).
[60] *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003) (5-4, Stevens, J.).
[61] 524 U.S. 498 (1998).
[62] See, e.g., T.W. Merrill, "The Landscape of Constitutional Property," *Virginia Law Review*, 86 (2000): 885-999; E. Kades, "Drawing the Line Between Taxes and Takings: The Continuous Burdens Principle, and Its Broader Application," *Northwestern University Law Review*, 97 (2002): 189-265, at 194 .
[63] E.g., J. Rubenfeld, "Usings," *Yale Law Journal*, 102 (1993): 1077-1163.
[64] The circumstance that the statute does not take money for the Government but instead makes it payable to third persons is not a factor I rely upon to show the lack of a taking. . . . "[T]he Government ought not to have the

capacity to give itself immunity from a takings claim by the device of requiring the transfer of property from one private owner directly to another." 524 U.S. 498 at 543-44.

[65] See, e.g., *Lingle v. Chevron U.S.A. Inc*., 544 U.S. 528 (2005).

[66] *Connolly v. Pension Benefit Guaranty Corp*., 475 U.S. 211 (1986) (9-0, per White, J.).

[67] 524 U.S. at 554.

[68] See, e.g., W.L. Church, "The Eastern Enterprises Case: New Vigor for Judicial Review?" *Wisconsin Law Review*, 2000 (2000): 547-570; R. J. Krotoszynski, Jr., "Expropriatory Intent: Defining Property Boundaries of Substantive Due Process and the Takings Clause," *North Carolina Law Review*, 80 (2002): 713–772.

[69] See generally C. R. Sunstein, *Radicals in Robes: Why Extreme Right-Wing Courts are Wrong for America* (Cambridge, MA: Basic Books, 2005); W. W. Van Alstyne, "Foreword: The Constitution In Exile: Is It Time To Bring It In From The Cold?" *Duke Law Journal*, 51 (2001): 1-25; Editor's Forward, "A New Constitutional Order?" *Fordham Law Review*, 75 (2006): 471-474.

[70] For leading exponents, see, e.g., R. Epstein, *Supreme Neglect* (New York: Oxford University Press, 2008); R. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton, NJ: Princeton University Press, 2004).

[71] 301 U.S. 619 (1937).

[72] 348 U.S. 483 (1955).

[73] See Sunstein, *supra* note 69 at 245; S.G. Calabresi, "Substantive Due Process after *Gonzales v. Carhart*," *Michigan Law Review*, 106(2008) 1517-1541.

[74] 545 U.S. 1 (2005).

[75] *Id*. at 34-35.

[76] See also *Albright v. Oliver*, 510 U.S. 266, 275 (1994) (Scalia, J., concurring) ("I reject the proposition that the Due Process Clause guarantees certain (unspecified) liberties, rather than merely guarantees certain procedures as a prerequisite to deprivation of liberty.").

[77] A. Scalia, "Economic Affairs As Human Affairs," *Cato Journal*, no. 3 (1985): 703-09, at 705-706.

[*78*] *U.S. v. Carlton*, 512 U.S. 26, 39 (concurring). See also *Lawrence v. Texas*, 539 U.S. 558, 592 (Scalia, J., dissenting, joined by Rehnquist, C.J. and Thomas, J.) ("there is no right to 'liberty' under the Due Process Clause. . . The Fourteenth Amendment expressly allows States to deprive their citizens of 'liberty,' so long as 'due process of law' is provided."); *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 598-99 (1996) (Scalia, J., dissenting, joined by Thomas, J.) ("I do not regard the Fourteenth Amendment's Due Process Clause as a secret repository of substantive guarantees against 'unfairness").

[79] Some others, it is worth noting, have advanced the opposite argument, that the government is constitutionally *compelled* to provide universal access in some fashion. See, e.g., S. A. Barber, *Welfare and the Constitution* (Princeton, NJ: University Press, 2003).